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In The

Supreme Court of The United States

October Term, 1965

No. 453

WILLIAM L. AUSTIN.....*Petitioner*

v.

COMMONWEALTH OF KENTUCKY.....*Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

The Commonwealth of Kentucky contends that certiorari should be denied in the present case for the following reasons:

1. The two publications in question are obscene under the test prescribed by this Court, and the jury in the McCracken circuit court correctly found them to be so according to contemporary community standards.

2. Section 436.100 of the Kentucky Revised Statutes is constitutional on its face and petitioner's right of freedom of speech was not abridged nor was he denied due process by the manner in which it was applied.

3. Petitioner's constitutional rights were not violated by refusal of the trial court to permit petitioner to introduce certain evidence on the issue of contemporary community standards.

ARGUMENT

I. THE TWO MAGAZINES IN THIS CASE ARE OBSCENE.

Under the test for obscene literature set out in *Roth v. United States*, 354 U.S. 476 (1957), in order for a publication to be declared obscene and beyond the protection of the Constitution it must appear that (1) the work is utterly without redeeming social importance, (2) the material goes substantially beyond customary limits of candor in description or representation of such matters, and (3) to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

The two magazines, "Spree" and "High Heels", which a jury of McCracken County, Kentucky, found to be obscene are "girlie" magazines containing numerous photographs of nude or semi-nude females in provocative or suggestive poses, some of them in rather intimate boudoir-type surroundings. In addition to the nude photographs there are a few stories whose sole theme is illicit sexual adventure. The advertisements in these two magazines are offensive by their terms and are designed to induce readers to tap further sources of indecent material. When the general make-up of the magazines and their over-all impact is considered it is clear that they are salacious and patently offensive.

It can hardly be doubted that these issues of "Spree" and "High Heels" are utterly without redeeming social importance. A jury composed of a cross-section of the community found that the material goes substantially beyond the customary limits of candor approved and accepted in Western Kentucky for newsstand magazines sold to the public. It is obvious that the dominant theme of the material taken as a whole appeals to prurient interest. In fact, the magazines were published for no other reason except to appeal to such interest.

This Court has declined to review three cases in which "girlie" magazines were held to be obscene by state courts under the test set out in the Roth-Alberts case, 354 U.S. 476.

In *State v. Chobot*, 12 Wis. (2) 110, 106 N.W. 2d 286 (1961) it was held that magazines were obscene which contained numerous photographs of nudes and semi-nudes in provocative poses, a great many of them on beds and davenports, with the pictures providing an appropriate setting for accompanying sex stories. One of the magazines was "Spree." The appeal to this Court was dismissed for want of a substantial federal question. *Chobot v. Wisconsin*, 368 U.S. 15. In *Monfred v. State*, 226 Md. 312, 173 A. 2d 173 (1961) although the court was of the opinion that "mere nudity in and of itself" was not obscene it found magazines of the same type involved in this case to be outside the protection of the Constitution:

> "But when each of the other five so-called 'girlie' magazines—Candid, Consort, Sextet, Cloud 9 and Torrid—is taken as a whole, that is, when the pictures reproduced therein are examined in conjunction with a perusal of the textual material, it is apparent that all of these publications are obscene within the meaning of the statute as well as under the obscenity test approved by the majority in the Roth-Alberts case, supra. All of them, without exception, present numerous pictures or drawings of nude or semi-nude women showing what the State characterized as 'come hither' expressions and poses interspersed with pointedly suggestive sex stories so placed that a reader if he needs visual aid in following the story has only to glance at the opposite page for additional stimulation. All of these five publications were obviously calculated to excite lustful thoughts in the mind of the reader. Thus, having made a determination of our own that the findings of fact were correct, we are unable to say that the trial court was in error as to the evidence in convicting all of the defendants for selling one or more of these magazines; nor did the lower court reach the wrong conclusion as to the law."

This Court denied certiorari in *Monfred v. Maryland*, 368 U.S. 953. See also *Goldstein v. Virginia*, certiorari denied, 372 U.S. 910 (1963).

The majority of state courts which have considered the matter are in agreement that "girlie" magazines of the type involved in this case are obscene. Thus, in *State v. Andrews*, 150 Conn. 103, 186 A. 2d 546 (1962) the court stated as follows:

> "The episode which is the subject of the first count of the defendant's two-count conviction occurred on June 17, 1960. On that occasion, a state police officer purchased the two magazines, heretofore mentioned. 'Modern Man—1960 Yearbook of Queens,' priced at $1, is replete with photographs of nude, semi-nude and indecently clad females. The subjects of a substantial majority of these photographs are posed against backgrounds and in postures highly suggestive of lascivious activity. Furthermore, this magazine, in the case of both photographs and text, is utterly devoid of any literary or artistic value. Although there are varying degrees of suggestiveness in the photographs, their cumulative effect and dominant theme lack any rational purpose other than to appeal to the prurient interest of the average man."

In *State v. Hudson County News Co.*, 78 N.J. Super. 327, 188 A. 2d 444 (1963) and in the opinion of the Supreme Court of New Jersey in *State v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 (1963) we find that the court was of the opinion that six "girlie-type" magazines were obscene. One of the magazines was "Spree." See also on the subject of this type of magazine *Cincinnati v. King*, 152 N.E. 2d 23 (Ohio, 1958); and *Gent v. State*, decided by the Arkansas court, 33 U.S. Law Week 2675.

It is submitted that the publications in question are not entitled to the constitutional guaranty of free speech since the jury had ample grounds for finding them obscene.

II. THE KENTUCKY STATUTE REQUIRES SCIENTER AND IS NOT UNCONSTITUTIONAL BECAUSE IT RAISES A REBUTTABLE PRESUMPTION OF KNOWLEDGE FROM THE FACT OF SALE. THE STATUTE WAS NOT CONSTRUED OR APPLIED IN AN UNCONSTITUTIONAL MANNER.

The Kentucky obscenity statute, KRS 436.100, did not until the year 1962 require by its terms that the seller of the obscene material be shown to have had knowledge of its nature or contents. As a result of the 1962 amendment the statute now expressly requires that the sale of an obscene magazine be "with knowledge of the contents or character." Subsection 4 of KRS 436.100 provides that the sale of any magazine found to be obscene shall be prima facie evidence that the seller had knowledge of the obscene character of the printed matter.

The Kentucky statute is not the same as that condemned by this Court in *Smith v. California*, 361 U.S. 147 since (1) it expressly requires that the sale be with knowledge of the contents or character of the publication, (2) the defendant may introduce evidence that he did not in fact have knowledge of the contents or character of the material and such evidence is relevant to the prosecution, and (3) the state is required to introduce evidence from which the jury could reasonably conclude that the seller had knowledge of the character of the material sold. The trial court in its instructions told the jury that it must believe from the evidence beyond a reasonable doubt that the defendant "had knowledge of the contents and the character" of the magazines sold (R. 26). The trial court did not inform the jury as to any presumption favoring the Commonwealth.

A statute creating a rebuttable presumption of knowledge of contents or character from the fact of sale is not unconstitutional. Such presumption was proposed by the American Law Institute in Section 207.10 of the 1957 draft of the Model Penal

Code and Section 251.4(2) of the 1962 Model Penal Code. It would seem proper to require that a seller of goods have general knowledge of the material making up his business and a presumption of such general knowledge from the fact of sale is both logical and reasonable. Thus, in *Cincinnati v. King*, 168 N.E. 2d 633 (Ohio, 1960) the court concluded that the knowledge required by this Court in Smith v. California was a general knowledge of the general, ordinary and usual contents of the books in the store, rather than any specific knowledge of the contents of a particular book. A reasonable presumption of such knowledge was thought by the Ohio court to arise from the fact of sale of the book in the defendant's business:

> "It seems utterly unreasonable and completely unrealistic to hold a book store proprietor responsible for such obligations as taxes on his property and merchandise, the payment of his utility bills, safety and sanitary measures in his store, federal withholding taxes, and all the other reasonable and necessary requirements to the legal and successful operation of his establishment, but allow him in an anti-obscenity prosecution to disclaim general knowledge of what he has for sale. Does not an automobile dealer know whether or not he has Corvairs or Cadillacs on his showroom floor. Does not a grocery owner know generally what vegetables he displays for sale? Does not the proprietor of a men's store know generally whether or not he has brown or green ties for sale, even though he might not be able to describe each one in detail? The answers obviously must be yes. We do not think the language of the United States Supreme Court in the *Smith case* is intended to allow booksellers to be ostriches with their heads buried in the sand. Furthermore, we are of the opinion that if and when the United States Supreme Court has before it for determination the extent of knowledge and notice required for a bookseller, it will decide that a bookseller cannot with impunity look the other way and deny any knowledge of his merchandise. We also believe that the scienter, made an indispensable factor by the *Smith case*, can be minimal, that is, only what is reasonable

> under the circumstances. It would not surprise us to find the highest court of the land sustaining a law or ordinance which made mere possession of books and especially magazines by booksellers prima facie proof of knowledge of their general and usual content, a presumption which could be rebutted if justified."

Mr. Justice Frankfurter in *Smith v. California*, 361 U.S. at p. 164 stated:

> "A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book."

The Commonwealth in this case produced sufficient evidence to warrant a jury concluding that the defendant had knowledge of the character of the two magazines upon which the prosecution was based. The magazines were stapled shut at the time of their purchase (E. 3). These two magazines along with a number of others of the same type had been isolated from the general run of magazines and placed in a special rack behind the cashier's stand (E. 4). Defendant admitted that the purpose of stapling the magazines and segregating them in a special rack was to make sure that their sales were limited to adults only (E. 31, 37). Defendant had conferred with local ministers at a meeting a year before the sale in question and had been advised by the ministers that they had been receiving complaints concerning the general class of magazines known as "girlie" magazines which were being sold in defendant's store (E. 18, 19, 37). The defendant was unquestionably aware of the objectionable features of this class of magazines. The photographs on the covers of the magazines are such as to give ample notice of the contents even upon casual inspection.

Mr. Justice Brennan stated for the Court in *Smith v. California*, 361 U.S. 154:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his

awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

It has been held that "circumstances" sufficient to warrant an inference of knowledge of the contents of an obscene publication are the stapling of the books, placing them behind the cashier's stand on a separate rack, the charging of a price which is apparently much too high considering the cheap nature of the publication, limitation of sales to adults only, and the nature of the pictures on the covers. *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711 (1964); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225 (1963); *Nebraska v. Jungclaus,* 176 Neb. 641, 126 N.W. 2d 858 (1964); *Connecticut v. Onorato,* 2 Conn. Cir. 428, 199 A. 2d 715 (1963).

The defendant was permitted to testify that he did not know that issues of the two magazines, "Spree" and "High Heels" were on sale in his store and no one had advised him of this (E. 34). However, he admitted that he had received complaints from ministers regarding "girlie" magazines in general and had as a consequence ordered that all such magazines be segregated and stapled (E. 30, 31). Objections were sustained to defendant's attempt to testify that it was impossible for him to know what he was selling because of the quantity of material which he handled in his business (E. 26, Q. 41, 27). Objections were also sustained to defendant's attempt to testify as to his partial use of a second class mailing permit as a guide to obscenity, and the meaning of issuance of such permit (E. 26, 28). It is no defense to a prosecution of this sort that Federal post office officials had allegedly approved a publication as non-obscene by issuing a mailing permit. See on the question of the mailing permit *People v. Cohen,* 205 N.Y.S. 2d 481 (1960) at pages 486, 487.

There was ample evidence in this case of scienter.

III. PETITIONER WAS PERMITTED TO INTRODUCE EVIDENCE THAT MAGAZINES OF THE SAME TYPE AS THE TWO IN QUESTION HAD BEEN SOLD AND ACCEPTED IN THE COMMUNITY. EXHIBITS OF DISSIMILAR AND NON-COMPARABLE MATERIAL WERE PROPERLY REFUSED.

The trial court in this case instructed the jury that the term "contemporary community standards" as used in the instructions did not refer to the standards of a particular locality but to the standard of "the contemporary society of this country at large or as a whole." (R. 27). It was pointed out in *Gent v. State*, decided by the Arkansas Supreme Court, 33 U.S. Law Week 2675, that a majority of this Court has not adopted the rule that the "community standard" must be the standard of the nation as a whole.

It is submitted that there is perhaps no such thing as a national standard. The material should be judged by the prevailing standards of the local community and a jury representing a cross-section of that community should be presumed to be aware of what the community standards are.

The petitioner as a wholesale as well as a retail dealer was permitted to testify that for a number of years he had sold the same type of magazine as the two for which he was being prosecuted and "there has never been an objection that we didn't observe and correct and adjust" (E. 32). Apparently there had been complaints heretofore and when the title of the particular publication was given to petitioner some action was taken to remove it or restrict its sale. Petitioner produced an expert witness, Dr. Lowry, who was permitted to testify that magazines of the same type as the two for which defendant was being prosecuted had been sold in the entire area for many years and accepted by the communities (E. 52).

The paperback books tendered by petitioner were properly

rejected as exhibits since they are a different class of material and are not comparable to the magazines on which the prosecution was based. "Spree" and "High Heels" have no literary value whatever, although this may not be true of the paperback books. Pictures of statues and other art objects taken from publications in the local public library were also properly rejected as exhibits since they are not similar or comparable to "girlie" magazines. It would be absurd to say that because nudity is accepted in recognized works of art it is also condoned and accepted by the community when utilized in the fashion of the "girlie" magazines. The nudist magazine involved in the *Sunshine Book Co. v. Summerfield* case was not similar or comparable to "Spree" and "High Heels" in that in the case of a legitimate nudist publication the models are not usually placed in provocative or sexy poses, there is no undue emphasis on sex and the publication purports to be justifiable as nothing more than a candid portrayal of the normal events in a colony of sun worshippers. Not all so-called nudist magazines are non-obscene. See *People v. Cohen*, 205 N.Y.S. 2d 481 (1960) at page 487.

It is submitted that the trial court properly refused to permit introduction of evidence of other publications which were not similar or comparable to the "girlie" magazines on trial. Petitioner was permitted to give evidence that magazines of the same type as "Spree" and "High Heels" had been widely sold in the area without objection for a number of years.

CONCLUSION

Certiorari should be denied in this case since the two publications in question are obscene, the Kentucky obscenity statute is constitutional, there was ample evidence to prove the element of scienter and petitioner was not denied the right to introduce evidence of the sale of comparable material.

Respectfully submitted,

ROBERT MATTHEWS
ATTORNEY GENERAL

BY

JOHN B. BROWNING
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT